

Herman Verbist – New CEPANI Rules of Arbitration in Force as from 1 January 2013

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CEPANI, the Belgian Centre for Arbitration and Mediation

CEPANI (The Belgian Centre for Arbitration and Mediation) has adopted new Arbitration Rules and new Mediation Rules which are applicable as from 1 January 2013. The new Arbitration Rules are attached herewith ([Dutch](#) and [French](#) – The translated English version will be finalized and published soon: on the Website of CEPANI and in this Review – 2013/Nr. 1).

CEPANI was created in 1969 at the initiative of the Belgian Federation of Enterprises (VBO/FEB) and the Belgian National Committee of the International Chamber of Commerce (ICC) (for more information see : www.cepni.be)¹¹. The CEPANI Rules of Arbitration have from the outset been inspired by the ICC Rules of Arbitration. This is reflected in a number of provisions and in particular also by the requirement under the CEPANI Rules of Arbitration, just like under the ICC Rules of Arbitration, that the Arbitral Tribunal must establish Terms of Reference before it can examine the matter.

The first version of the CEPANI Arbitration Rules and “Facultative Conciliation” (as the Mediation Rules were called in the early years) was adopted in 1972. The CEPANI Rules of Arbitration were thereupon amended a few times, namely on 1 January 1988, on 1 January 1996 (with a new scale on costs), and subsequently on 1 January 2000¹² and on 1 January 2005¹³.

On 1 January 1997 CEPANI introduced a set of Rules for Arbitration of Disputes of Limited Financial Importance. This procedure is applicable to disputes whereby the principal claim and the counterclaim together do not exceed 12.500 EUR [then 500.000 BEF]. With the revision of the CEPANI Arbitration Rules in 2013 the threshold for the application of the Rules for Arbitration of Disputes of Limited Financial Importance is increased to 25.000

¹¹ For a description of the history of CEPANI in the first 20 years of its existence, see : G. Keutgen, “Belgisch Centrum voor Studie en Praktijk van Nationale en Internationale Arbitrage”, *T.v.A.*, The Hague, 1993, 59-70.

¹² For an analysis of the 2000 Revision of the CEPANI Arbitration Rules, see : H. Verbist and K. Dhondt, “CEPINA (Belgisch Centrum voor Arbitrage en Mediatie) wijzigt zijn reglementen”, *T.B.H./R.D.C.B.*, Brussels, 2000, 357-365; H. Verbist and K. Dhondt, “Le Centre belge d’arbitrage et de médiation (CEPANI) adopte de nouveaux règlements. Lignes de force.”, *R.D.I.D.C.*, Brussels, 2000, 115-134.

¹³ For an analysis of the 2005 Revision of the CEPANI Arbitration Rules, see : H. Verbist and K. Dhondt, “De nieuwe CEPINA-Reglementen”, *Tijdschrift@ipr.be*, Ghent University, 2006, N° 1, April 2006, 63-79; H. Verbist and K. Dhondt, “Gewijzigde CEPINA-Reglementen van toepassing sedert 1 januari 2005”, *R.W.*, Antwerp, 2005-2006, 1073-1078; H. Verbist and K. Dhondt, “Règlements modifiés du CEPANI en vigueur depuis le 1er janvier 2005”, *R.D.I.D.C.*, Brussels, 2005, 375-404.



EUR. The arbitration proceedings for disputes of limited financial importance can be conducted in a more speedy way, because shorter time limits are foreseen for the filing of submissions by the parties, because a sole arbitrator will be appointed and because no Terms of Reference are to be established.

Not only the CEPANI Arbitration Rules were amended as from 1 January 2013. The CEPANI Mediation rules likewise were revised. They were reworded and restructured so to align them with the Mediation Rules that had been operative since 1 January 2010 for the resolution of disputes in the field of Information and Communication Technology (ICT). As a consequence of this alignment and consolidation, the ICT Mediation Rules no longer exist as a separate set of rules as from 1 January 2013.

Revision of the CEPANI Arbitration Rules

Important amendments were made to the CEPANI Arbitration Rules. New provisions on multiparty arbitration have been inserted and the Rules also provide henceforth the possibility of calling upon an “emergency arbitrator” before the arbitration on the substance of the matter starts. The new Rules of 2013 contain in total 38 Articles, whereas the Rules of 2005 consisted of only 28 Articles. The newly added Articles deal with :

- The task of CEPANI (Article 1);
- Definitions of terms used in the Rules (Article 2);
- Electronic communications (Article 8(2));
- Multiple parties (Article 9);
- Multiple contracts (Article 10);
- Intervention (Article 11);
- Jurisdiction of the Arbitral Tribunal (Article 12);
- Proof of authority (Article 19);
- Acting in a timely manner and in good faith (Article 23(1));
- Closing of the proceedings (Article 24);
- Confidentiality of the arbitration proceedings (Article 25);
- Interim and conservatory measures prior to the constitution of the Arbitral Tribunal (Article 26);
- Correction and interpretation of the Award – Remission of the Award (Article 33);
- Limitation of liability (Article 37).

In addition, the Articles 6 and 7 of the 2005 Rules of Arbitration were consolidated into one Article (Article 8 – Written notifications or communications and time limits) and the Articles 20 and 22 of the 2005 Rules also were consolidated into one Article (Article 29 – Making of the award). Moreover, the General rule of the final provision (Article 38) was reworded and various other provisions were revised. The revision of the CEPANI Rules of Arbitration of 2013 took into account some important amendments made in 2012 to the ICC



Rules of Arbitration and amendments to Rules of other arbitral institutions, as well as amendments made in 2010 to the UNCITRAL Arbitration Rules.

The Rules for Arbitration of Disputes of Limited Financial Importance adopted the same amendments, at least to the extent that these provisions are also applicable. As a consequence, the Rules for Arbitration of Disputes of Limited Financial Importance contain now 31 Articles whereas the 2005 version of these Rules contained only 28 Articles. The provisions of the CEPANI Arbitration Rules that were not included in the 2013 revision of the Rules for Arbitration of Disputes of Limited Financial Importance are:

- Extension of the time limit for filing the answer (Article 5 of the Arbitration Rules);
- Multiple parties (Article 9 of the Arbitration Rules);
- Multiple contracts (Article 10 of the Arbitration Rules);
- Intervention (Article 11 of the Arbitration Rules);
- Jurisdiction of the Arbitral Tribunal (Article 12 of the Arbitration Rules)
- Consolidation (Article 13 of the Arbitration Rules);
- Closing of the proceedings (Article 24 of the Arbitration Rules);
- Interim and conservatory measures prior to the constitution of the Arbitral Tribunal (Article 26 of the Arbitration Rules).

This contribution gives an overview of the most important amendments to the CEPANI Arbitration Rules in force as from 1 January 2013 .

Overview of the 2013 amendments to the CEPANI Arbitration Rules

Introductory provisions (Articles 1 and 2)

The 2013 Rules contain two introductory provisions which were not yet contained in the 2005 Rules.

Article 1 stresses that CEPANI is an independent body and that its task consists in administering arbitration proceedings in accordance with its Rules (Article 1(1)). For the sake of clarity, it is added that CEPANI does not itself resolve disputes and that it does not itself act as an arbitrator (Article 1(2)) .

Article 2 provides definitions of a number of terms used in the Rules : Secretariat, President, Appointments Committee, Challenge Committee, Arbitral Tribunal, Claimant and Respondent, Award, Order, days and Rules.

With the definition of arbitration agreement, CEPANI wishes to make clear that the term arbitration agreement has a broad meaning and that it can mean not only any form of mutual agreement to have recourse to arbitration, but that it can also include the consent to arbitration by authorities in the case of an investment dispute.



Application of the new Rules (Article 7(1))

As already foreseen in the 2005 Rules (Article 5(1)), the new 2013 Rules provide (Article 7(1)) that they will be applicable to all arbitrations commenced after they entered into force (i.e. 1 January 2013), unless the parties have agreed to resort to an earlier version of the Rules.

Electronic communications (Article 8(2))

In the 2013 Rules the provisions of Article 6 and 7 of the 2005 Rules have been consolidated into one Article (Article 8). At the same time, the provision on the methods of communication has been slightly reformulated so to include explicitly that communications in electronic form are authorised. Whereas the 2005 Rules indicated that the Request for Arbitration, the Answer to the Request for Arbitration, all pleadings, the appointment of arbitrators and the notification of the Award shall be valid if they are made against receipt, by registered mail, courier, fax or any other means of telecommunication that proves their dispatch (Article 7(1)) of the 2005 Rules), the 2013 Rules make it explicit that with other means of telecommunication is meant in electronic form (Article 8(2)). It is added that other notifications and communications made pursuant to these Rules shall be validly effected by any other means of written communication Article 8(2)) and also that the Arbitral Tribunal may decide that other notification and communication rules shall apply (Article 8(3)).

Multiparty arbitration (Articles 9 to 13)

Whereas the 2005 Rules dealt in only one Article with multiparty arbitration (Article 12), the 2013 Rules contain five provisions dealing with various aspects of multiparty arbitration. The new Article 9 formulates the principle that an arbitration may take place between more than two parties when they have agreed to have recourse to arbitration under the CEPANI Rules (Article 9(1)), while adding thereby that each party may make a claim against any other party, subject to the limitations set out in Article 23(8) of the Rules with respect to the filing of new claims (Article 9(2)).

The new Article 10 make it possible to deal in one arbitration with claims arising out of different contracts and out of different arbitration agreements, however subject to two conditions that need to be complied with : (a) all the parties must have agreed to CEPANI arbitration and (b) all the parties must have agreed to have their claims decided within a single procedure (Article 10(1)). Differences concerning the applicable rules of law or the language of the proceedings do not give rise to any presumption as to the incompatibility of the arbitration agreements (Article 10(2)). Arbitration agreements concerning matters that are not related to one another give rise to a presumption that the parties have not agreed to have their claims



decided in a single set of proceedings. Finally, Article 10 specifies that within a single set of proceedings each party may make a claim against any other party, subject to the limitations set out in Article 23(8) of the Rules with respect to the filing of new claims (Article 10(4)).

The new Article 11 provides the possibility for a third party to intervene in a pending arbitration or for a party in the arbitration to request the intervention of a third party to the arbitration. The intervention may be allowed when the third party and the parties to the dispute have agreed to have recourse to arbitration under the CEPANI Rules (Article 11(1)). No intervention may take place after the Appointments Committee or the President of CEPANI has appointed or confirmed each of the members of the Arbitral Tribunal, unless all the parties, including the third party, have agreed otherwise (Article 11(2)). A request for intervention must be filed with the Secretariat and, if it is already constituted, with the Arbitral Tribunal (Article 11(3)). The request should contain the elements set out in Article 11(4)). Finally, Article 11 specifies that the intervening third party may make a claim against any other party, subject to the limitations set out in Article 23(8) of the Rules with respect to the filing of new claims (Article 11(5)).

The new Article 12 provides the jurisdiction of the Arbitral Tribunal to rule on all disputes in connection with Articles 9 to 11 of the Rules, including disputes as to its own jurisdiction (Article 12(1)). Moreover, it stipulates that any decisions of the Appointments Committee or the President of CEPANI as to the appointment or the acceptance of the members of the Arbitral Tribunal shall not prejudice the power to determine jurisdiction.

Article 13 of the 2013 Rules deals with the consolidation of pending proceedings, when one or more contracts containing an arbitration agreement providing for the application of the Rules give rise to separate arbitrations, which are related or indivisible (Article 13(1)). It largely corresponds to Article 12 of the 2005 Rules but adds a specification on the conditions under which a consolidation of several CEPANI proceedings is possible.

The Appointments Committee or the President of CEPANI shall grant the application for consolidation if it is presented by all the parties and if they have also agreed on the manner in which the consolidation shall occur. If this is not the case, the Appointments Committee or the President of CEPANI may grant the application for consolidation, after having considered notably: (a) whether the parties have not excluded consolidation in the arbitration agreement; (b) whether the claims made in the separate arbitrations have been made pursuant to the same arbitration agreement; or (c) where the claims have been made pursuant to more than one arbitration agreement, whether they are compatible and whether the proceedings involve the same parties and concern disputes arising from the same legal relationship.

When taking its decision, the Appointments Committee or the President shall, moreover, take account of the progress made in each of the arbitrations and notably of the fact that one or more arbitrators have been appointed or confirmed in more than one of the arbitrations and, as the case may be, of the fact that the persons appointed or confirmed are the same, and also of the place of arbitration provided for in the arbitration agreements (Article 13(2)). Except if



agreed otherwise by the parties with regard to the principle of consolidation and the manner in which it shall occur, the Appointments Committee or the President of CEPANI may not order consolidation of arbitrations in which a decision has already been rendered with regard to preliminary measures, admissibility or as to the merits of a claim (Article 13(3)).

Independence and impartiality of the arbitrator (Articles 14 and 16)

Whereas the CEPANI Arbitration Rules thusfar only requested the prospective arbitrator to sign a statement of independence (Article 8(2) of the 2005 Rules) while adding in the Rules of Good Conduct for Proceedings organised by CEPANI that the arbitrator in the course of the arbitration proceedings shall in all circumstances show the utmost impartiality (Rule 6), the new 2013 Rules henceforth require every proposed arbitrator prior to his appointment or confirmation to sign a statement of availability, acceptance and independence (Article 14(2)). The new Rules also stipulate that the arbitrator undertakes that, once he has been appointed or confirmed, not only he shall remain independent until the end of his appointment, but also that he shall remain impartial and also be available.

Decisions taken by the Challenge Committee of CEPANI on challenges of arbitrators are taken without recourse and the reasons of the decisions shall not be communicated (Article 16(4)). This new provision was added to the Rules in line with the already existing provision that the decisions taken by the Appointments Committee or the President of CEPANI as to the appointment, approval or replacement of an arbitrator do not have to state the reasons for the decision (Article 14(4); Article 8(4) of the 2005 Rules).

Conference for the drawing up of the provisional procedural timetable (Article 22(4))

Whereas the 2005 Rules also contained the requirement for the Arbitral Tribunal to establish a provisional procedural timetable for the conduct of the arbitration when drawing up the Terms of Reference or as soon as possible thereafter (Article 16(3) of the 2005 Rules), the 2013 Rules specify that the provisional procedural timetable may be drawn up at any conference with the parties organized by the Arbitral Tribunal, either of its own motion or at the request of any party. The conference may be organized via any means of communication (Article 22(4)).

Proof of authority (Article 19)

At any time after the introduction of the arbitration, the Arbitral Tribunal or the Secretariat may require proof of authority to act from any representative of any party (Article 19).



Acting in a timely manner and in good faith (Article 23(1))

The new CEPANI Rules of Arbitration stress the importance of conducting the arbitration proceedings in a timely manner and in good faith. This requirement is spelled out for the Arbitral Tribunal and the parties. In particular, the new Rules state that the parties shall abstain from any dilatory acts as well as from any other action having the object or effect of delaying the proceedings (article 23(1)).

Closing of the proceedings (Article 24)

As soon as possible after the last hearing or the filing of the last admissible documents the Arbitral Tribunal shall declare the proceedings closed (Article 24(1)). If it deems it necessary, the Arbitral Tribunal, at any time prior to the rendering of the Award, may decide, on its own motion or at the request of any party, to re-open the proceedings (Article 24(2)).

Confidentiality of the arbitration proceedings (Article 25)

Whilst it is often held that arbitration is confidential, this was not yet stated as such in the CEPANI Arbitration Rules. The 2005 Rules only contained a provision stating that the hearings shall not be public and that, save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted (Article 17(5) of the 2005 Rules). The new 2013 Rules stipulate that the arbitration proceedings shall be confidential, unless it has been agreed otherwise by the parties or there is a legal obligation to disclose the arbitration proceedings shall be confidential (Article 25).

Interim and conservatory measures prior to the constitution of the Arbitral Tribunal (Article 26)

Probably the most important novelty of the new CEPANI Arbitration Rules is Article 26 on interim and conservatory measures prior to the constitution of the Arbitral Tribunal. Inspired by the “emergency arbitrator” provisions contained in the 2012 ICC Rules of Arbitration (Article 29 of the ICC Rules; and Appendix V to the ICC Rules), the new CEPANI Rules provide the possibility for parties, unless they have agreed otherwise, to request CEPANI to appoint an arbitrator to decide on a request for interim and conservatory measures which cannot await the constitution of the Arbitral Tribunal. Given the urgency of such request, Article 26 provides for a fast track procedure to deal with a request for interim and conservatory measures prior to the constitution of the Arbitral Tribunal.

Within two working days of the receipt of the request by the Secretariat, the Appointments Committee or the President appoints an arbitrator who shall provisionally decide on the



measures urgently requested (Article 26(4)). The arbitrator deciding on the provisional measures may not be appointed as arbitrator in an arbitration which is related to the dispute at the origin of the Request (Article 26(6)). Within three working days of receipt of the file, the arbitrator deciding on provisional measures shall draw-up a procedural calendar (Article 26(8)).

A challenge may be made against an arbitrator deciding on provisional measures (Article 26(7)). In principle, the arbitrator deciding on provisional measures renders his decision at the latest within fifteen days of his receipt of the file (Article 26(10)). The request for interim and conservatory measures is only transmitted to the Appointments Committee or the President when the Secretariat has received the above-mentioned amount (Article 26(11)).

The decision shall be in the form of a reasoned Order or, if the arbitrator deciding on provisional measures deems it appropriate, in the form of an Award (Article 26(10)). The arbitrator sends his decision to the parties, with copy to the Secretariat (Article 26(10)).

Correction and interpretation of the Award – Remission of the Award (Article 33)

The new Article 33 provides the possibility, in line with Article 1702 *bis* of the Belgian Judicial Code, for parties to file with the Secretariat within one month of the notification of the award a request to correct or to interpret parts of the arbitral award (Article 33(2)) or an application for the interpretation of a point or specific section of an award (Article 33(3)). The Arbitral Tribunal may on its own initiative, within one month of the notification of the award to the parties, correct any clerical, computational or typographical error or any errors of a similar nature (Article 33(1)). After receipt of an application referred to in Article 33(2) and Article 33(3), the Arbitral Tribunal shall grant the other party a short time limit which shall not exceed one month from the date of the application in order to submit any comments (Article 33(4)). A decision to correct or interpret an Award shall take the form of an Addendum and shall constitute an integral part of the Award (Article 33(5)).

Also new is Article 33(6), which provides the possibility for an Arbitral Tribunal to be seized again of the matter, after having rendered the arbitral Award, when a jurisdiction remits an Award to the Arbitral Tribunal. CEPANI may take all necessary measures in order to allow the Arbitral Tribunal to comply with the decision to remit the Award to the Arbitral Tribunal and may determine an advance payment for the purposes of recovering all additional arbitration fees and expenses of the Arbitral Tribunal as well as the additional administrative costs of CEPANI (Article 33(6)).

Limitation of liability (Article 37)

Another new provision is Article 37 dealing with the limitation of liability. Except in the case of fraud, the arbitrators shall not incur any liability for any act or omission when carrying out their functions of ruling on a dispute (Article 37(1)). For any other act or omission in the



course of an arbitration proceeding, the arbitrators, CEPANI and its members and personnel shall not incur any liability except in the case of fraud or gross negligence (Article 37(2)).

Residual provision (Article 38)

The "General rule" foreseen in the last provision of the CEPANI Arbitration Rules has also been revised. Whereas Article 28 of the 2005 Rules stipulated that, unless otherwise agreed by the parties, all issues that were not specified in the CEPANI Arbitration Rules should be subject to the Belgian Arbitration Law (Chapter VI of the Belgian Judicial Code), the new "Residual provision" (Article 38 of the 2013 Rules) no longer foresees that the provisions of the Belgian Arbitration Law shall be applicable in case an issue was not specified in the Rules. Article 38 stipulates that, unless otherwise agreed by the parties, for all issues that are not specifically provided for in the CEPANI Arbitration Rules the Arbitral Tribunal and the parties shall act in the spirit of the Rules and shall make every reasonable effort to make sure that the award is enforceable at law.

Schedule on Parties' Costs (Schedule II)

Finally, the CEPANI Arbitration Rules also have three Schedules, one of which is new. In addition to the Scale on Costs (Schedule I) and the Rules of Good Conduct for Proceedings organized by CEPANI (Schedule III), there is henceforth a new Schedule on Parties' Costs (Schedule II) containing recommendations on the parties' costs.

The recommendations concern the reimbursement of all the reasonable costs borne by a party for the defence of its interests, such as the costs of legal assistance and representation, costs related to the production of evidence by experts or by witness testimony as well as internal costs. The recommendations clarify that in its Award relating to parties' costs the Arbitral Tribunal may take account of the circumstances of the case, the financial importance and the degree of difficulty of the case, the manner in which the parties have cooperated in handling the case, the relevance of the arguments presented and the degree to which the claim has been successful.



Conclusion

The revision of the CEPANI Arbitration Rules of 2013 constitutes the largest revision of the Rules since the first Rules were adopted in 1972. The new provisions on multiparty arbitration are an important clarification of a practice which has developed in the recent past, also in CEPANI arbitration. The introduction of the possibility to call upon an “emergency arbitrator” for interim and conservatory measures before the constitution of the Arbitral Tribunal represents an important new feature of CEPANI arbitration.

By adopting these new Rules, CEPANI (The Belgian Centre for Arbitration and Mediation) stands by its fundamental objective which is to offer the best possible service to the business community, including an excellent method for the settlement of business disputes.

